

Original Filed
December 27, 2000

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 00-31727-BDM
Chapter 13
LES DeVILLE,
Debtor.

NOREEN CARDINALE,
Plaintiff,

A.P. No. 00-3142-DM

v.
ROBERT FITZ-STEPHENS,
individually and dba FIRST
FINANCIAL and FIRST FINANCIAL
MORTGAGE, STEPHEN DAGGETT,
DANIEL MILLER, JR.,
individually and dba MILLER
FINANCIAL and MILLER AUTOSPORT,
LES DeVILLE, and DOES 1-100,
inclusive,

**MEMORANDUM DECISION AWARDING
SANCTIONS AGAINST
ARLO H. SMITH AND DANIEL R.
MILLER, JR.**

Defendants.

In re Case No. 00-43878-RN
Chapter 13
STEVEN J. DAGGETT,
Debtor.

1 NOREEN CARDINALE,

A.P. No. 00-3182-DM
(Formerly A.P. No. 00-4305)

2 Plaintiff,

3 v.

4 ROBERT FITZ-STEPHENS et al.,

5 Defendants.
_____)

6 In re

Case No. 00-32297
(Formerly Case No. 00-45087)¹

7 DANIEL MILLER,

8 Debtor.
_____)

10
11 This court issued orders to show cause in these proceedings
12 why sanctions should not be imposed against Arlo H. Smith, Esq.
13 ("Smith"), who has been counsel for the above-captioned defendants
14 both in this court and in a state court action initiated by
15 plaintiff, and against Daniel R. Miller, Jr. ("Miller"), one of
16 those defendants. Testimony was taken from Smith at a hearing on
17 September 29, 2000 (in Case No. 00-32297) and from both Smith and
18 Miller at a hearing on October 27, 2000 (in Case No. 00-43878,
19 A.P. No. 00-3182) (collectively, the "OSC Hearings"). Appearances
20 were noted on the record.

21 As further set forth below this court finds that Smith and
22 Miller have engaged in a pattern of manipulating the bankruptcy
23 system involving repeated and improper removals of plaintiff's
24 state court action to different divisions of this bankruptcy court
25 and serial bankruptcy filings in order to frustrate prosecution of
26

27 ¹ The above-captioned cases and adversary proceedings are
28 hereby procedurally consolidated on the limited issue of
sanctions.

1 plaintiff's state court action. This court will award plaintiff
2 sanctions against Smith in the amount of \$16,645.50 and Miller,
3 jointly and severally with Smith, for \$11,097.00 of that amount.
4 This court reserves jurisdiction to award plaintiff additional
5 sanctions based on her reasonable attorneys' fees and costs in
6 connection with the hearings on this matter. After such amounts
7 are determined a separate order and judgment will issue for the
8 total amount of sanctions.

9 **FACTS²**

10 On March 9, 1998 plaintiff filed an action in the Superior
11 Court of the State of California, County of Alameda, later
12 transferred to Contra Costa County, against the above-captioned
13 defendants, entitled Noreen Cardinale v. Robert Fitz-Stephens,
14 individually and dba First Financial and First Financial Mortgage,
15 Steven Daggett, Daniel R. Miller, Jr., individually and dba Miller
16 Financial and Miller Autosport, Les DeVille, and Does 1-100,
17 inclusive (Alameda Co. Case No. 795346, Contra Costa Case No. C98-
18 03078) (the "Action"). All of the defendants in the Action were
19 initially represented by Smith. As further described below, Smith
20 also represented several defendants in their voluntary bankruptcy
21 cases.

22 1. Smith's Conduct in the DeVille and Daggett
23 Bankruptcies

24 On October 8, 1999 Smith filed a voluntary chapter 13
25 petition on behalf Mr. Les DeVille ("DeVille"), of one of the
26

27 ² The following discussion constitutes the court's
28 findings of fact and conclusions of law. Fed. R. Bankr. P.
7052(a).

1 defendants in the Action, in Division Four of this court in
2 Oakland, California (the "Oakland Division") (Case No. 99-47983).
3 On the same day Smith removed the Action to the Oakland Division
4 (A.P. No. 99-4494). On December 3, 1999 an order was entered
5 denying a second application for extension of time for DeVille to
6 file schedules, and on December 7, 1999 his bankruptcy case was
7 dismissed. On January 7, 2000 the Action was remanded to Contra
8 Costa Superior Court.

9 A jury trial in the Action was set in the Superior Court for
10 June 27, 2000. On that morning Smith filed a voluntary chapter 13
11 petition in the Oakland Division on behalf of a second defendant
12 in the Action, Mr. Steven John Daggett ("Daggett") (Case No. 00-
13 43878). The same day Smith once again removed the Action to the
14 Oakland Division (A.P. No. 00-4259).

15 The Superior Court re-set the trial for July 17, 2000,
16 contingent upon the dismissal of Daggett from the Action and
17 remand from the Oakland Division. On June 30, 2000 plaintiff
18 voluntarily dismissed Daggett from the Action.³ On July 14, 2000
19 the Action was remanded by Chief Judge Jellen on plaintiff's
20 unopposed motion and application for order shortening time (the
21 "First Remand Motion").

22 That same day, July 14, 2000, Smith filed another voluntary
23 chapter 13 petition on behalf of DeVille. This time the petition
24 was filed in Division Three of this court (the "San Francisco
25 Division") (Case No. 00-31727). On the same day Smith removed the
26

27 ³ Notwithstanding the removal of the Action to bankruptcy
28 court, plaintiff filed her dismissal of Daggett (and, later,
DeVille) in the Superior Court.

1 Action again (A.P. No. 00-3142) but this time to the San Francisco
2 Division. This was the third bankruptcy case and removal by a
3 defendant in the Action since October 8, 1999.

4 On July 17, 2000 plaintiff voluntarily dismissed DeVille from
5 the Action. On July 20, 2000 plaintiff again moved to remand the
6 Action and applied for an order shortening time (collectively, the
7 "Second Remand Motion"). On July 21, 2000 this court issued an
8 order setting a hearing date of July 27, 2000, and ordered Smith
9 show cause why he should not be sanctioned "for removing this
10 action, in what appears to have been done for an improper purpose,
11 including the harassment of plaintiff, the unnecessary delay of
12 the Contra Costa Superior Court action, and the needless increase
13 in the litigation costs to be absorbed by plaintiff" (the "First
14 OSC"). The First OSC explained:

15 In view of Chief Judge Jellen's remand of this action to
16 the Contra Costa Superior Court, the July 14th removal
17 by Arlo H. Smith, Esq. on behalf of Les DeVille seems
patently improper in several respects and cause for
sanctions under Fed. R. Bankr. P. 9011.

18 In particular, the removal appears to have been
19 made to the wrong court, notwithstanding the fact that
Mr. DeVille's Chapter 13 case was filed in this
division. * * *

20 Second, there does not appear to be a good faith
21 purpose for the removal since Mr. DeVille's filing
22 resulted in an automatic stay under 11 U.S.C. § 362(a)
that protected him. Why would a protected debtor/
23 defendant need to remove an action to the bankruptcy
court when the plaintiff would be required to file a
24 proof of claim here? Where is the jurisdiction of this
court over the action against non-debtor defendants?
25 Mr. Smith apparently wishes to use Mr. DeVille's Chapter
13 case to protect the other defendants he represents in
26 this case by frustrating the repeated efforts of the
Contra Costs Superior Court to bring this matter to
27 trial.

28 On July 26, 2000 plaintiff filed a revised version of the

1 Second Remand Motion, together with a declaration by one of
2 plaintiff's attorneys, Thomas Eastridge, Esq. (the "Eastridge
3 Declaration"). The Eastridge Declaration stated that Eastridge
4 and another attorney for plaintiff, Martha Louise Caron, Esq.
5 ("Caron"), had spent "54.23 hours in attorney time unnecessarily
6 preparing for trial on two occasions, attributable to the
7 defendants' removal actions, as well as preparing the moving
8 papers and appearing in Bankruptcy Court." Eastridge attached to
9 his declaration an itemization of that time. He declared that he
10 and Caron have a billing rate of \$225.00 per hour, and that the
11 reasonable value of such time is therefore \$12,201.75.

12 On July 27, 2000 Smith filed his Response To Motion For
13 Remand Of Action (the "Smith Response"). At the hearing on July
14 28, 2000 this court remanded the Action. The Superior Court re-
15 set the trial in the Action for August 14, 2000.

16 The Smith Response included a request for additional time to
17 respond to plaintiff's request for an award of attorneys' fees.
18 At the July 28, 2000 hearing this court directed Smith to file
19 that response within two weeks and ordered him not to remove the
20 Action on behalf of any of the defendants. On August 11, 2000
21 Smith filed his "Declaration Re: Removal And Claims Of Costs"
22 (Smith's "First Declaration"), which claimed that the removal was
23 proper. That declaration also commented on each of the itemized
24 time entries attached to the Eastridge Declaration.

25 2. Miller's Conduct in the Daggett Bankruptcy

26 On August 11, 2000 Miller, acting *pro se*, purported to remove
27 the Action to Daggett's bankruptcy case in the Oakland Division
28 (Case No. 00-43878). Miller did this notwithstanding that Daggett

1 was no longer a defendant in the Action and that Chief Judge
2 Jellen had previously remanded the Action in the Daggett
3 bankruptcy.

4 Smith assisted Miller in filing the removal papers. Miller
5 removed the Action using a photocopy of a superseded form used by
6 Smith, which petitions for removal under a statute repealed over
7 15 years ago, 28 U.S.C. § 1471 -- the current procedure is to file
8 a notice of removal. 28 U.S.C. §§ 1452 et seq.; Fed. R. Bankr. P.
9 9027. Smith had previously informed Miller -- accurately -- that
10 this court's order only barred Smith, not anyone else, from
11 removing the Action. However, Miller testified at the second OSC
12 Hearing (and the court finds) that Smith encouraged him to remove
13 the Action, referred him to a paralegal for that purpose and, at
14 the paralegal's suggestion, supplied him with a copy of the form
15 Smith had used.⁴

16 Despite Smith's assistance, this court does not believe
17 Miller was simply relying on advice of counsel, as Miller's
18 attorney argued at the second OSC Hearing. Miller testified that
19 he asked Smith and another attorney whether the First OSC
20 prevented anyone other than Smith from removing the Action, and he
21 then paid \$50.00 to a paralegal recommended by Smith to prepare
22

23 ⁴ Although Smith testified at the first OSC Hearing that
24 he had encouraged Miller *not* to remove the Action, this court does
25 not believe Smith. Smith also stated, in his "Declaration Re:
26 OSC" filed on September 22, 2000, that Miller "did not file a
27 bankruptcy for himself as I would have done were I to have filed a
28 removal." In other words, although Smith may have realized that
the Action could not be removed to Daggett's bankruptcy because
Daggett was no longer a defendant, he believed Miller would file
his own bankruptcy case and encouraged Miller to remove the Action
to his own bankruptcy case, just as Smith had done in the DeVille
and Daggett bankruptcy cases.

1 the removal papers which he filed himself. Miller did not
2 question whether removal to Daggett's bankruptcy case was proper
3 now that Daggett was no longer a defendant and in light of Chief
4 Judge Jellen's prior remand of the same Action from the same
5 bankruptcy case. This court believes that Miller chose to ignore
6 these problems and took a "head in the sand" approach.

7 On August 14, 2000 plaintiff appeared in Superior Court for
8 trial of the Action, apparently unaware of Miller's purported
9 removal of the Action. Smith withdrew as Miller's counsel in the
10 Action, and Miller gave the Superior Court judge a copy of a
11 petition for removal and stated that he would also be filing his
12 own bankruptcy petition. The Superior Court set a new trial date
13 of September 5, 2000.

14 On August 16, 2000 plaintiff filed an application in the
15 Daggett bankruptcy case for transfer of the removed Action (A.P.
16 No. 00-4305) from the Oakland Division to the San Francisco
17 Division. On August 18, 2000 that application was granted, and
18 the removed Action was transferred to the undersigned and given a
19 new number (A.P. No. 00-3182). On August 28, 2000 plaintiff filed
20 another motion to remand the Action (the "Third Remand Motion").

21 On August 29, 2000 this court issued an order granting the
22 Third Remand Motion but retaining jurisdiction to enter sanctions
23 or other appropriate relief against Smith and Miller based on
24 their apparent complicity in a pattern of improper removals of the
25 Action (the "Second OSC"). The Second OSC noted that there was no
26 jurisdiction to remove the Action because no remaining party in
27 the Action was a debtor in any pending bankruptcy case. The
28 Second OSC also stated that this court was prepared to find, based

1 on the history of the defendants' bankruptcy cases, that Miller
2 was well aware of the following:

3 Judge Jellen's prior remand of the state court
4 action from the Oakland Division; this court's
5 July 28 instructions to Mr. Smith that he should
6 not file any further removal petitions without
7 prior court approval; Mr. Daggett's dismissal from
the state court action; and the fact that the
court has under submission sanctions to be imposed
against Mr. Smith for his conduct in the prior
removal of the state court action to this division.

8 The Second OSC set a hearing for September 29, 2000 and
9 required Smith and Miller to file any declarations or other papers
10 in response to the Second OSC no less than five days before the
11 hearing.

12 3. Miller's Bankruptcy and Testimony

13 On September 5, 2000, the morning that the Action was to go
14 to trial in Superior Court, Miller's voluntary chapter 13 petition
15 was filed in the Oakland Division. Plaintiff was the only
16 creditor listed on Miller's matrix of creditors.

17 Miller's petition listed a Richmond, California address as
18 the "location of principal assets of business debtor." Richmond
19 is in the County of Contra Costa, placing venue in the Oakland
20 Division. B.L.R. 1001-3(c) and 1002-1. However at the second OSC
21 Hearing Miller testified that he has no business operations at the
22 listed address in Richmond -- 553 12th Street -- and that the
23 location of his business assets is the address stated in his
24 removal papers in the Daggett bankruptcy case: 1656 El Camino
25 Real, San Carlos, California. Both San Carlos and Miller's home
26 address, in San Bruno, California, are in the county of San Mateo,
27 placing venue in the San Francisco Division. B.L.R. 1001-3(b) and
28 1002-1.

1 Smith testified at the first OSC Hearing that he used to live
2 at the 553 12th Street address. Plaintiff produced a recent
3 photograph that Smith acknowledged to be of the building. The
4 photograph was admitted in evidence without objection as
5 Exhibit A. The building is a boarded-up residence.

6 Smith testified at the first OSC Hearing that he had not
7 filed Miller's bankruptcy petition, and that he could not have
8 done so because he appeared in Contra Costa Superior Court on the
9 morning the petition was filed. Moreover, Smith claimed not to
10 recognize the handwriting on the petition that set forth the
11 petitioner's mailing address and Social Security number and the
12 division of this court.

13 Miller testified at the second OSC Hearing that he had given
14 Smith a petition signed in blank for Smith to complete and file on
15 his behalf, that the handwriting on the filed petition was
16 Smith's, and that after he returned from a trip to Lake Tahoe over
17 Labor Day weekend he was told by Smith's assistant that she had
18 filed the petition on September 5, 2000. This court believes
19 Miller's testimony, and believes that Smith lied to the court when
20 he claimed not to recognize his own handwriting on Miller's
21 petition.

22 Miller further testified that, at Smith's request, he had
23 signed four or five petitions in blank over the past six or seven
24 months and given them to Smith, but that these petitions had not
25 been used because papers were filed by Daggett and DeVille
26 instead. In addition, Miller testified that his chapter 13
27 petition contains several misstatements. The petition lists his
28 home address as "1261 Whitman Way #24," in San Bruno, California.

1 However, his address is "2161" Whitman Way. The petition lists
2 his social security number as "xx-xxx-1725," but he testified that
3 the correct number is "xx-xxx-4827." The petition was accompanied
4 by a notice of available chapters that included the same
5 misstatements.

6 On September 5, 2000 -- the same day that Miller's bankruptcy
7 petition was filed -- plaintiff filed an *ex parte* application in
8 the Oakland Division to transfer the bankruptcy case to the
9 undersigned in the San Francisco Division. The Superior Court re-
10 set the trial in the Action to September 6, 2000, and subsequently
11 severed Miller from that case and conducted the trial against the
12 remaining defendant, Mr. Robert Fitz-Stephens.

13 On September 22, 2000 plaintiff moved for relief from the
14 automatic stay to permit the Action to proceed against Miller, and
15 for shortened time to hear that motion (the "Relief From Stay
16 Motion"). On September 25, 2000 this court set a hearing for
17 September 29, 2000 on that motion, together with a hearing on the
18 First and Second OSC. On September 29, 2000 plaintiff's Relief
19 From Stay Motion and the First and Second OSC came on for hearing.
20 Miller failed to appear.⁵

21
22 ⁵ The parties dispute whether Miller had an adequate
23 reason for failing to appear at the combined hearing on the Relief
24 From Stay Motion and the First OSC. Smith's "Declaration Re: OSC"
25 filed on September 22, 2000 anticipated Miller's non-appearance
for alleged medical reasons and asked for a continuance because
"my ability to defend this OSC will be prejudiced if I don't have
Miller's testimony" Plaintiff challenges this medical
excuse.

26 Both Eastridge and Caron stated at the start of the September
27 29, 2000 hearing that they had seen Miller outside the courtroom
just prior to the first OSC Hearing and that he did not appear
28 sick. Miller later testified, at the second OSC Hearing, that he
had waited 45 minutes for his matter to be called, that he had
significant medical problems, and that Smith suggested he leave if

1 This court granted plaintiff's Relief From Stay Motion,
2 allowed plaintiff to take Smith's testimony, and continued the
3 hearing until October 27, 2000 to allow plaintiff and Smith the
4 opportunity to secure Miller's attendance.

5 On October 26, 2000 Miller filed an Amendment to Petition
6 that corrected his mailing address. On the same day he
7 voluntarily dismissed his chapter 13 petition.

8 On October 27, 2000 this court held the second OSC Hearing,
9 at which both Smith and Miller testified. In addition to the
10 facts described above, Miller testified that he and Smith are
11 friends, they had known each other for about six or seven years,
12 they had frequently lived together, Smith has acted as his
13 attorney, he passes legal documents along to Smith without reading
14 them, he is a licensed real estate sales person acting under
15 Smith's real estate license, he and Smith own (with one other
16 person) and operate Terrabella Financial Group, Inc., dba
17 Terrafinancial and dba Bella Vista Properties ("Terrabella"), and
18 he had been involved in litigation with plaintiff for three years
19 or so. According to Smith, Miller owns a separate entity that is
20 also called Terrafinancial ("Terrafinancial"), but Smith has no

21
22 he were sick and Smith would explain his absence to the court.
23 Miller also testified that later in the same week he missed an
24 appearance in another action between the parties in San Francisco
Superior Court. Miller acknowledged that he appeared in
succeeding days and testified in the trial of plaintiff's Action
against Mr. Fitz-Stephens in Superior Court.

25 On this record this court is not prepared to find that
26 Miller's medical condition was a fiction. Moreover, the First OSC
27 was not directed against Miller, nor was he under a subpoena to
28 appear at the first OSC Hearing. Although this court is dubious
that Miller, who had testified in this court on other matters, was
too sick to advise the court himself that he was too ill to stay,
there is nothing sanctionable in Miller's choice not to defend the
Relief From Stay Motion.

1 ownership interest in that entity. Miller was confused about the
2 ownership interests in Terrabella and Terrafinancial, and deferred
3 to Smith regarding his share of any profits, corporate
4 formalities, and other aspects of the businesses. Even after
5 Miller filed his *pro se* removal papers, Smith continued to
6 represent Miller in another matter before the court (In re Nicole
7 Gestas, Case No. 00-30089). Both Smith and Miller testified that
8 they had an ongoing, close business relationship.

9 DISCUSSION

10 1. Legal Standards

11 Rule 9011 provides in relevant part:

12 (b) **Representations to the court.** By presenting to the
13 court (whether by signing, filing, submitting, or later
14 advocating) a petition, pleading, written motion, or other
15 paper, an attorney or unrepresented party is certifying that
to the best of the person's knowledge, information, and
belief, formed after an inquiry reasonable under the
circumstances,--

16 (1) it is not being presented for any improper purpose,
17 such as to harass or to cause unnecessary delay or
needless increase in the cost of litigation;

18 (2) the claims, defenses, and other legal contentions
19 therein are warranted by existing law or by a
20 nonfrivolous argument for the extension, modification,
or reversal of existing law or the establishment of new
law;

21 (3) the allegations and other factual contentions have
22 evidentiary support or, if specifically so identified,
23 are likely to have evidentiary support after a
reasonable opportunity for further investigation or
discovery; and

24 (4) the denials of factual contentions are warranted on
25 the evidence or, if specifically so identified, are
reasonably based on a lack of information or belief.

26 (c) **Sanctions.** If, after notice and a reasonable
27 opportunity to respond, the court determines that subdivision
28 (b) has been violated, the court may, subject to the
conditions stated below, impose an appropriate sanction upon
the attorneys, law firms, or parties that have violated

1 subdivision (b) or are responsible for the violation.

2 * * *

3 (2) *Nature of sanction; limitations.* A sanction imposed
4 for violation of this rule shall be limited to what is
5 sufficient to deter repetition of such conduct or comparable
6 conduct by others similarly situated. Subject to the
7 limitations in subparagraphs (A) and (B), the sanction may
8 consist of, or include, directives of a nonmonetary nature,
an order to pay a penalty into court, or, if imposed on
motion and warranted for effective deterrence, an order
directing payment to the movant of some or all of the
reasonable attorneys' fees and other expenses incurred as a
direct result of the violation.

9 (A) Monetary sanctions may not be awarded against a
10 represented party for a violation of subdivision (b)(2).

11 (B) Monetary sanctions may not be awarded on the court's
12 initiative unless the court issues its order to show
13 cause before a voluntary dismissal or settlement of the
claims made by or against the party which is, or whose
attorneys are, to be sanctioned.

14 (3) *Order.* When imposing sanctions, the court shall
15 describe the conduct determined to constitute a violation of
this rule and explain the basis for the sanction imposed.

16 The Ninth Circuit has broadly identified two types of
17 sanctionable conduct under Rule 9011: "frivolous" claims, and
18 claims presented for an "improper purpose." Valley Nat. Bank of
19 Arizona v. Needler (In re Grantham Bros.), 922 F.2d 1438, 1441-
20 1443 (9th Cir. 1991) (noting that Rule 9011 "mirrors" Rule 11, F.
21 R. Civ. P.), cert. denied, 502 U.S. 826, 112 S.Ct. 94, 116 L.Ed.2d
22 66 (1991).

23 "Frivolous" claims include those that are "legally
24 unreasonable, or without legal foundation." Zaldivar v. City of
25 Los Angeles, 780 F.2d 823 (9th Cir. 1986), abrogated on other
26 grounds by Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110
27 S.Ct. 2447, 110 L.Ed.2d 359 (1990) (abuse of discretion standard,
28 not mixed standard, applies to Rule 11 sanctions).

1 Frivolous claims are sanctionable even if the same pleadings
2 contain other, non-frivolous claims. Townsend v. Holman
3 Consulting Corp., 929 F.2d 1358, 1362-1365 (9th Cir. 1990),
4 rehearing denied (1991).

5 Persons presenting papers to the court are responsible for
6 taking steps to assure that those papers are not frivolous.

7 Counsel, of course, may not avoid "the sting of
8 Rule 11 sanctions by operating under the guise of a
pure heart and empty head."

9 Security Farms v. Int'l Brotherhood of Teamsters, Chauffers,
10 Warehousemen & Helpers, 124 F.3d 999, 1016 (9th Cir. 1997),
11 quoting Smith v. Ricks, 31 F.3d 1478, 1488 (9th Cir. 1994), cert.
12 denied, 514 U.S. 1035, 115 S.Ct. 1400, 131 L.Ed.2d 287 (1995),
13 quoting Zuniga v. United Can Co., 812 F.2d 443, 452 (9th
14 Cir.1987).

15 The same "empty head" rule applies to parties appearing *pro*
16 *se.* In re KTMA Acquisition Corp., 153 B.R. 238, 248 (Bankr. D.
17 Minn. 1993).

18 Both the "frivolous" claims prong and "improper purpose"
19 prong of Rule 9011 are objective tests. Zaldivar, 780 F.2d at 829
20 and 831 n.9. The Ninth Circuit has elaborated:

21 Although the term "improper purpose" can be
22 construed to require an improper subjective intent,
this court analyzes an allegedly improper purpose
23 under an objective standard. Zaldivar, 780 F.2d at
831 n. 9. The consequences of the attorney's act
24 are irrelevant, as we focus only on the attorney's
objective intent. Id. at 832.

25 Needler, 922 F.2d at 1443.

26 The term "objective intent" has been interpreted to mean that
27 the court determines the intent from the evidence, rather than the
28 parties' assertions. Such evidence can include circumstances such

1 as "[r]epeated filings, the outrageous nature of the claims made,
2 or a signer's experience in a particular area of law, under which
3 baseless claims have been made" Pitts v. Britt (In re
4 Kunstler), 914 F.2d 505, 519 (4th Cir. 1990), reh. denied, cert.
5 denied 499 U.S. 969, 111 S.Ct. 1607, 113 L.Ed.2d 669 (1991).

6 For example, in Needler the Ninth Circuit rejected an
7 attorney's argument that he had an ethical duty to prevent what he
8 subjectively alleged was a fraud on the court. After the
9 bankruptcy court had approved a sale of real property, and the
10 time for objections had passed, the attorney filed a complaint
11 seeking to remove the bankruptcy trustee and enjoin the trustee's
12 sale. The Ninth Circuit held that "no ethical duty requires an
13 attorney to file an improper collateral attack on a judge's
14 order." Needler, 922 F.2d at 1142.

15 *Pro se* litigants are entitled to greater latitude with
16 respect to the reasonableness of legal theories than a lawyer, but
17 they must conduct a reasonable inquiry in light of their own legal
18 knowledge and experience and the complexity of the legal and
19 factual issues. KTMA Acquisition, 153 B.R. at 251-253 (\$10,000
20 sanctions against *pro se* litigant for pleading with numerous
21 irrelevant, unsubstantiated, sensational factual and legal
22 allegations).

23 2. Sanctions Against Smith

24 The First OSC noted that in DeVille's second bankruptcy case
25 Smith removed the Action to the wrong division of this court:

26 "Since the underlying action was pending in the
27 Contra Costa Superior Court, the Oakland Division
28 would have been the proper division for removal, to
be followed by a request to a judge of that
division for a transfer to this division. In view

1 of Chief Judge Jellen's prior remand, however, it
2 is obvious that counsel intentionally avoided that
unattractive alternative."

3 In the Smith Response, filed prior to the July 28, 2000
4 hearing, Smith stated: "I disagree with the court's position that
5 this case was removed to the wrong division of the bankruptcy
6 court. There is no statute or local rule that permits removal of
7 an action to any court other than the **one where the bankruptcy is**
8 **pending.**" (Emphasis in original.)

9 Smith is wrong. Rule 9027 of the Federal Rules of Bankruptcy
10 Procedure provides that "notice of removal shall be filed with the
11 clerk for the district and division within which is located the
12 state or federal court where the civil action is pending." Fed.
13 R. Bankr. P. 9027(a)(1) (emphasis added). See also 28 U.S.C.
14 § 1452(a). The proper procedure for Smith to remove the Action to
15 DeVille's second (San Francisco) bankruptcy case would have been
16 to file a notice of removal in the Oakland Division followed by an
17 ex parte application for transfer of the adversary proceeding to
18 the San Francisco Division pursuant to B.L.R. 1002-1(c).

19 Addressing the purpose for removal, both the Smith Response
20 and Smith's First Declaration stated:

21 2. I concede the action was properly remanded
22 because plaintiff has dismissed De Ville [sic] from the
23 underlying action. However, until counsel took that
24 action removal [w]as proper and necessary, since I
25 believe litigation of any claim against Mr. DeVille
26 would, if successful, require an indemnity claim to be
27 asserted by DeVille thereafter against other defendants
(with substitute counsel). As a matter of judicial
economy, **all** claims (both the claims against DeVille
and co-defendants, and any possible indemnity claim by
DeVille against anyone else) should be heard by the
same court, to assure uniformity of rulings. It was
for this reason, the removal was undertaken.

28 3. It might have been malpractice **not** to remove

1 the case. This is so because opposing counsel
2 previously indicated orally that she would not dismiss
3 DeVille as a party to the underlying case **unless he**
4 **filed bankruptcy and removed the case!** Counsel was
5 very specific in making this representation to me and
6 the state court judge. Since I believe Mr. DeVille had
7 limited involvement and no liability in the underlying
8 case, I believe that **not** removing his case could have
9 subjected me to claims of putting my personal interests
10 in accom[m]odating opposing counsel ahead of Mr.
11 DeVille's interests! [Emphasis and exclamation points
12 in original.]

13 This is utter nonsense. If judicial economy demanded that
14 matters involving DeVille and the other defendants be heard in the
15 same court, the Superior Court was the natural venue and this
16 court was not. The Superior Court was familiar with the case, and
17 it apparently had jurisdiction over the other defendants, which
18 this court does not. Moreover, assuming Smith's duty to his
19 client extended as far as filing DeVille's bankruptcy petition on
20 the eve of trial, it did not extend to his removal of the Action
21 without any legitimate reason that Smith has been able to
22 articulate. This court finds that Smith removed the Action in the
23 DeVille case for the purposes of causing unnecessary delay,
24 harassing plaintiff and needlessly increasing plaintiff's
25 litigation costs.

26 In addition, this court finds that Smith later removed the
27 Action in the Daggett bankruptcy case and assisted Miller in
28 removing the Action again for the same purposes. This court does
not believe Smith's attempts to paint Miller as the driving force
behind the second removal to Daggett's bankruptcy case. Rather,
this court finds that Smith encouraged Miller to file the removal
because Smith could not do so under this court's July 28, 2000
order, and he provided Miller with a form for doing so. Whether

1 through inadvertence or design, Miller neglected to file his own
2 bankruptcy case and instead attempted to remove the Action to
3 Daggett's bankruptcy case; but whatever the mechanism, this court
4 finds that Smith intended for Miller to remove the Action to cause
5 unnecessary delay, harass plaintiff and needlessly increase
6 plaintiff's litigation costs.

7 Moreover, although filing a bankruptcy petition even on the
8 eve of trial is usually a legitimate alternative, this court is
9 very troubled by several aspects of Smith's involvement in
10 Miller's "pro se" voluntary petition. First, Smith orchestrated
11 the filing: he requested that Miller sign several bankruptcy
12 petitions in blank, he completed one of those petitions, and he
13 arranged for that petition to be filed, commencing Miller's
14 bankruptcy petition in Case No. 00-32297. Second, plaintiff was
15 the only person on the creditor matrix. Third, this court does
16 not believe that the misstatements on the face of the petition
17 were inadvertent errors. This court finds that Smith
18 intentionally listed an incorrect business address so as to put
19 Miller before the Oakland Division in the hope of avoiding or
20 delaying any appearance before the undersigned after the First OSC
21 had issued. Fourth, this court finds that Smith's use of an
22 incorrect business address, an incorrect home address, and an
23 incorrect social security number for Miller were all designed to
24 delay the administration of Miller's case and make it difficult
25 for plaintiff to serve Miller with court papers or a subpoena.
26 Fifth, this court finds that Smith orchestrated the serial
27 bankruptcy filings and removals of the Action by the defendants
28 one by one, and that those actions were spread out so as to

1 maximize the delay, cost and harassment to plaintiff.

2 In sum, this court finds and rules that Smith's removals in
3 the DeVille and Daggett bankruptcies, his participation in
4 Miller's second removal in the Daggett bankruptcy, his intentional
5 misstatements on Miller's bankruptcy petition, and his
6 orchestration of serial bankruptcy filings and removals by the
7 defendants were all part of a scheme to cause unnecessary delay,
8 harass plaintiff and needlessly increase plaintiff's litigation
9 costs. Accordingly, sanctions are appropriate against Smith
10 pursuant to Fed. R. Bankr. P. 9011.

11 This court finds and rules that an award of plaintiff's
12 reasonable attorneys' fees attributable to Smith's misconduct, as
13 determined below, would not be sufficient to deter repetition of
14 such conduct or comparable conduct by others similarly situated,
15 including the other defendants in the Action. See Rule
16 9011(c)(2). First, Smith has sought to gain advantage not simply
17 by imposing litigation costs on plaintiff but also by harassing
18 plaintiff and causing unnecessary delay. Therefore, awarding
19 attorneys' fees does not by itself equal all of the advantage
20 Smith sought to (and did) achieve. Second, if awarding attorneys'
21 fees were the only sanction it would likely cost Smith client's
22 substantially less than defending themselves at trial. Therefore,
23 absent a greater sanction there is a danger that Smith's tactics
24 would appear to be a cost-effective means to delay or avoid trial.

25 Accordingly, this court will impose sanctions not only in the
26 allowed amount of plaintiff's reasonable attorneys' fees requested
27 to date, as determined below, but also in the additional amount of
28 200% of those fees. This court reserves jurisdiction to award

1 plaintiff additional sanctions, including her reasonable
2 attorneys' fees and costs incurred after the time reflected in the
3 Eastridge Declaration.

4 3. Sanctions Against Miller

5 Miller's conduct is careless but initially less troubling.
6 He freely admitted to signing multiple bankruptcy petitions in
7 blank for Smith to complete and file. He also admitted receiving
8 legal papers and passing them along to Smith without reviewing
9 them. In general Miller takes the approach that he innocently
10 gave Smith full responsibility for all actions taken on his
11 behalf. By itself this behavior is not sanctionable. Until
12 August 14, 2000 Smith was Miller's attorney in the Action. Many
13 clients trust their attorneys to complete documents signed in
14 blank, and to review documents that they choose not to review.

15 Nevertheless, Miller could not reasonably continue that
16 cavalier attitude of total reliance on Smith after he was
17 purporting to act *pro se*. Miller was not represented by Smith
18 when he removed the Action to Daggett's bankruptcy case. Assuming
19 without deciding that Miller believed Smith's bogus justifications
20 for removing the Action in prior cases, even Smith admitted that
21 there was no reason to remove the Action to Daggett's bankruptcy
22 case once plaintiff had dismissed Daggett. Miller knew or should
23 have known that there was no legitimate reason to remove the
24 Action to Daggett's bankruptcy case when Daggett was no longer a
25 defendant.

26 Moreover, Miller's and Smith's testimony have only reinforced
27 this court's preliminary factual findings in the Second OSC.
28 Miller was well aware of Chief Judge Jellen's prior remand of the

1 state court action from the Oakland Division, this court's July
2 28, 2000 instructions to Smith that he should not file any further
3 removal petitions without prior court approval, Daggett's
4 dismissal from the state court action, and the fact that this
5 court had under submission sanctions to be imposed against Smith
6 for his conduct in removing the Action.

7 In addition, Miller later alluded to the true purpose of his
8 actions -- including not only the purported removal but also his
9 voluntary bankruptcy petition. He testified that it had not been
10 necessary to file his own papers sooner because papers had been
11 filed for DeVille and Daggett. In other words, Miller correctly
12 saw his actions as part of a larger scheme of serial bankruptcies
13 and removals by the defendants, one by one, all designed to cause
14 unnecessary delay, needlessly increase plaintiff's litigation
15 costs, and harass plaintiff. Although Smith was the driving force
16 in this scheme, Miller was a knowing participant.

17 For all of these reasons, Miller's purported removal of the
18 Action to the Daggett bankruptcy case and Miller's own *pro se*
19 bankruptcy petition (Case Nos. 00-45087 and 00-32297) warrant
20 sanctions.⁶ Taking into account all of the above conduct, this

21
22 ⁶ This court is not prepared to sanction Miller, however,
23 for the misstatements on his bankruptcy petition. First, it is
24 unclear when Miller received a copy of that petition. Second,
25 although the petition was filed for him on a *pro se* basis, it is
26 not clear that Miller knew that. Smith continued to represent
27 Miller in the Gestas case (Case No. 00-30089), and Miller may have
28 assumed he was represented by Smith in his chapter 13 bankruptcy
as well. Third, although Miller admitted receiving papers from
the bankruptcy court (notwithstanding his incorrect address on the
petition), it is possible those papers did not alert him to his
"pro se" status. Some of the papers served by the bankruptcy
court were also served on Smith. Only one document plainly
identifies Miller as *pro se* - the San Francisco Division's Notice
of Transfer of Case - and it is unclear whether that document

1 court finds and rules that appropriate sanctions are as follows.

2 Miller shall be jointly and severally liable with Smith for
3 the allowed amount of plaintiff's reasonable attorneys' fees
4 requested to date, as determined below. In addition, Miller shall
5 be jointly and severally liable with Smith for another 100% of
6 those fees. This court reserves jurisdiction to award plaintiff
7 additional sanctions, including her reasonable attorneys' fees and
8 costs incurred after the time reflected in the Eastridge
9 Declaration.

10 This court now turns to the reasonable amount of plaintiff's
11 attorneys' fees requested to date.

12 4. Plaintiff's Attorneys' Fees

13 This court has reviewed the time records attached to the
14 Eastridge Declaration and the objections in Smith's First
15 Declaration and finds as follows. Smith objects to all time spent
16 to take DeVille's deposition, to "sever" or "bifurcate" matters
17 involving DeVille, and to prepare for trial, on the grounds that
18 time spent on these matters was not caused by removal of the
19 Action. Smith states, "[t]here is no showing that Mr. De Ville
20 [sic] does not have the perfect right to file bankruptcy" and he
21 emphasizes that only the removal is at issue.

22 Some of these objections are well taken. There is no showing
23 that the time spent on the deposition is attributable to any
24 misconduct by Smith. In addition, there is no showing that
25 plaintiff would not have spent just as much time to "sever" or

26 _____
27 (sent to the wrong address) reached Miller. Therefore, this court
28 will not sanction Miller for the incorrect information on his
bankruptcy petition.

1 "bifurcate" matters involving DeVille if Smith had simply filed
2 his bankruptcy petition on the eve of trial, which as Smith
3 suggests he is generally entitled to do.

4 In a vacuum Smith's remaining objection, to trial
5 preparation, would be well taken. However absent removal by Smith
6 the trial likely would have been bifurcated immediately and would
7 have proceeded the same day, after plaintiff voluntarily dismissed
8 DeVille (and Daggett too, if he had filed a bankruptcy petition
9 the same day). Therefore, Smith's misconduct forced plaintiff's
10 attorneys to prepare for trial more than once. Although much
11 trial preparation can be useful for a continued trial date, any
12 trial lawyer will attest that a significant proportion of the time
13 spent in preparation just prior to trial has to be repeated before
14 the continued trial date. Attorneys and witnesses simply cannot
15 remember all the details and remain as prepared for trial weeks or
16 months later.

17 Nevertheless, plaintiff has not presented evidence of any
18 time spent preparing for trial before Smith's October 8, 1999
19 removal on behalf of DeVille (Case No. 99-47983, A.P. No. 99-
20 4494). Moreover, the time records attached to the Eastridge
21 Declaration only extend as far back as November 15, 1999, and do
22 not reflect any significant trial preparation until after that
23 bankruptcy case was dismissed and the Action had been remanded.
24 Therefore this court must assume that Smith's improper tactics are
25 not the cause of plaintiff's time spent prior to the filing of
26 Daggett's bankruptcy petition and removal on June 27, 2000 (Case
27 No. 00-43878, A.P. 00-4259).

28 Plaintiff seeks compensation for 2.4 hours of attorney time

1 on June 27, 2000 for "Appearance Department 6, Contra Costa
2 Superior Court for trial call [Caron]," and 2.33 hours on the same
3 day for "Appearance Department 6, Contra Costa Superior Court for
4 trial call [Eastridge]." Smith objects that the appearance "took
5 less than half [an] hour, not 2.4 hours." In this court's
6 experience, appearances for trial call usually include time spent
7 on final review of the case, often while waiting for the case to
8 be called. There is almost inevitably some additional time that
9 is not completely productive but is nevertheless unavoidable.
10 Although plaintiff could have provided greater detail, this court
11 will accept plaintiff's representation that the recorded time on
12 this matter by Caron (2.4 hours on 6/27/00) and Eastridge (2.33
13 hours on 6/27/00) is appropriately billable to the Action. These
14 fees will be awarded.

15 Fees will also be awarded for telephone calls to bankruptcy
16 counsel about the removal (0.33 hours on 6/27/00 and 0.5 hours on
17 6/30/00), drafting and filing the First Remand Motion and
18 accompanying documents including an application to shorten time
19 (1.8 hours and 1.3 hours on 7/7/00), telephone calls and
20 correspondence with Smith, with Chief Judge Jellen's law clerk,
21 and with Superior Court Judge Flinn's law clerk, an appearance
22 before Chief Judge Jellen, and preparation of a notice of ruling,
23 all apparently stemming from the removal (0.4 hours and 0.6 hours
24 on 7/10/00, and 1.6 hours and 0.7 hours on 7/14/00).

25 This court will award attorneys fees for a portion of the
26 time spent on preparing for the continued trial on July 15 and 16,
27 and appearing for trial on July 17, 2000. Smith objects that he
28 had left a telephone message "to the effect that he had filed a

1 removal on behalf of Mr. DeVille" on the answering machine for
2 plaintiff's attorneys on July 14, 2000 (a Friday) "at about 6 PM."
3 Smith adds that although on July 15, 2000 their office fax machine
4 "would not accept faxes," on July 16, 2000 he successfully faxed
5 the removal papers to their facsimile number. Therefore, Smith
6 claims, plaintiff's attorneys knew or should have known before
7 July 17, 2000 that he had "removed the case."

8 Plaintiff's attorneys do not directly answer these
9 allegations, but Eastridge claimed in his papers filed before the
10 Smith Response and Smith First Declaration that on July 17, 2000
11 "plaintiff appeared in Superior Court prepared to commence her
12 jury trial. However, Smith informed plaintiff's counsel and Judge
13 Flinn that he had filed another Chapter 13 and had once against
14 removed the case to Bankruptcy Court."

15 Plaintiff's proof is not as complete as it might be, but this
16 court is convinced that there is nothing inconsistent between
17 Smith's allegations that he attempted to contact plaintiff's
18 counsel the allegations in Eastridge's declaration and time
19 records that plaintiff's attorneys had in fact spent the weekend
20 preparing for trial. Such preparation could have been either in
21 ignorance of Smith's messages, or in the expectation that, just as
22 Smith protests that he is entitled to file bankruptcy petitions at
23 the last minute, he could also proceed with trial at the last
24 minute, either as a trial tactic or to avoid sanctions for
25 improper removals. In any event, plaintiff's counsel were
26 entitled to prepare for trial, and a portion of their time is
27 attributable to Smith's misconduct in repeatedly removing the
28 Action and forcing them to repeat their trial preparations.

1 Plaintiff's time sheets reflect 4.5 hours of trial
2 preparation on July 15 and 3.2 hours on July 16, 2000 of which the
3 court will award approximately one-half (2.3 hours on 7/15/00 and
4 1.6 hours on 7/16/00). This court will also award fees for time
5 spent appearing for trial on July 17, 2000, drafting, filing and
6 serving the Second Remand Motion and accompanying papers,
7 consulting bankruptcy counsel, and attempting to serve Smith with
8 a copy of the July 21, 2000 OSC on Saturday July 22, 2000 (2.7
9 hours on 7/17/00, 1.6 hours on 7/19/00, 2.7 hours on 7/20/00, 0.3
10 hours on 7/21/00, 1.1 hours on 7/21/00 and 0.4 hours on 7/22/00).

11 In sum, this court will award a total of 24.76 hours, at \$225
12 per hour, for a subtotal of \$5,548.50 in attorneys' fees against
13 Smith. This court will award additional sanctions against Smith
14 equal to 200% of that amount, or \$11,097.00, for a total of
15 \$16,645.50. Miller will be jointly and severally liable with
16 Smith for all of the base amount of attorneys' fees and another
17 100% of that amount, for a total of \$11,097.00.⁷

18 **DISPOSITION**

19 No later than 14 days after the date of service of this
20 Memorandum Decision plaintiff is to file and serve a declaration
21 setting forth her reasonable attorneys' fees and costs incurred
22 after the time reflected in the Eastridge Declaration, with

23
24 ⁷ Smith and Miller presented no evidence of as to their
25 ability to pay sanctions. "Although ability to pay must be
26 considered by a [trial] court, inability to pay should be treated
27 like an affirmative defense, with the burden upon the parties
28 being sanctioned to come forward with evidence of their financial
status." Dodd Ins. Services, Inc. v. Royal Ins. Co. of America,
935 F.2d 1152, 1160 (10th Cir. 1991) (citations and quotation
marks omitted). For whatever reason - perhaps, to avoid
disclosure of their assets - Smith and Miller chose not to present
such evidence.

1 appropriate records attached. Plaintiff should simultaneously
2 submit and serve a form of Order and Judgment consistent with this
3 Memorandum Decision, leaving blank the final amount of fees and
4 sanctions. Smith and Miller have 10 days after service to
5 respond. At that time the matter will stand submitted.

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7 Dated: December 27, 2000

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Dennis Montali
United States Bankruptcy Judge
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